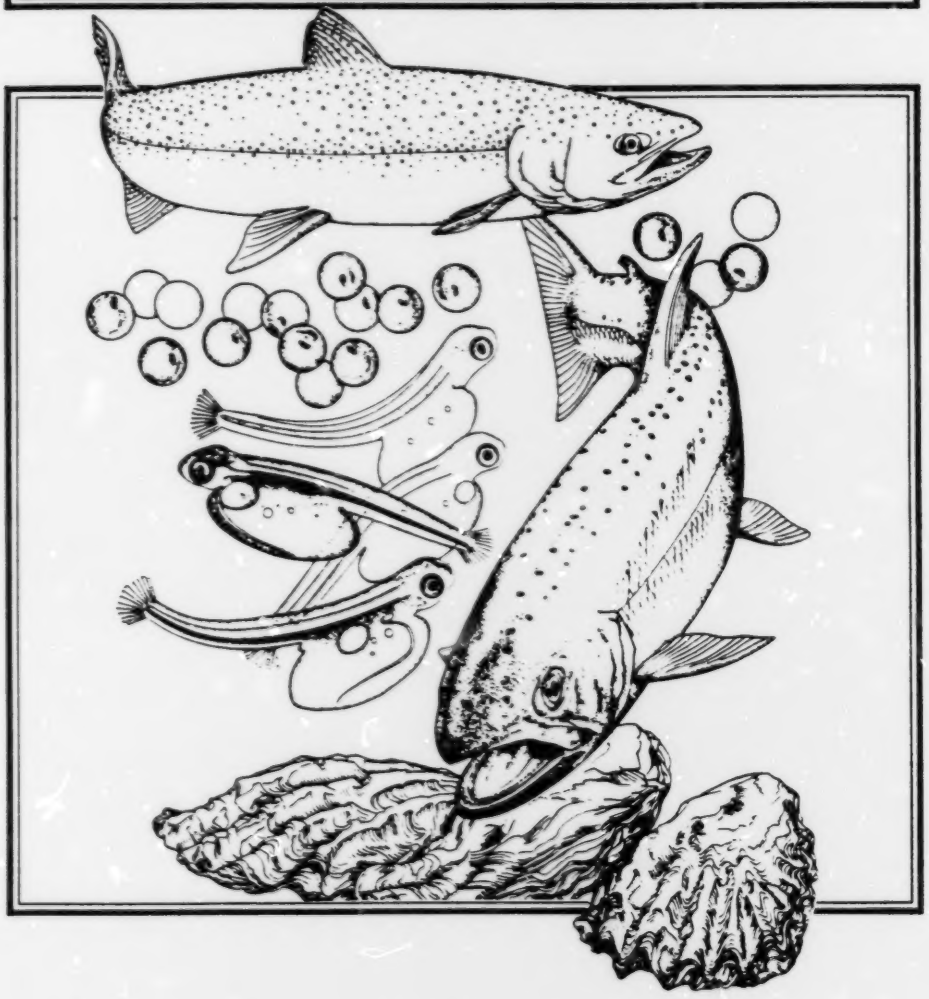
Aquaculture Industry Development Report

Aquaculture Legislation in British Columbia: A Comparative Legal Analysis



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Aquaculture Legislation in British Columbia: A Comparative Legal Analysis

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AQUACULTURE LEGISLATION IN BRITISH COLUMBIA: A COMPARATIVE LEGAL ANALYSIS

I. PREFACE.....3

II. INTRODUCTION.....5

III. JURISDICTION OVER AQUACULTURE.....8

A. Constitutional Jurisdiction.....8

B. Territorial Jurisdiction.....11

C. Federal Jurisdiction.....12

D. Provincial Jurisdiction.....13

E. Municipal Jurisdiction.....14

F. The Memorandum of Understanding (MOU)....15

G. Conclusion.....21

IV. EXISTING LEGISLATION IN BRITISH COLUMBIA.....22

A. Federal Legislation.....22

B. Provincial Legislation.....27

V. LEGISLATION IN FOREIGN JURISDICTIONS.....33

Nova Scotia.....33

Newfoundland.....34

New Brunswick.....35

Norway.....36

Hong Kong.....37

Great Britain.....38

New Zealand.....40

Australia.....41
Queensland.....41
South Australia.....41
Northern Australia.....42
Tasmania.....42

175667

United States.....43
Alaska.....44
California.....45
Connecticut.....45
Florida.....45
Hawaii.....46
Illinois.....46
Maine.....46
Maryland.....47
New Jersey.....47
Mississippi.....47
New Hampshire.....48
Oregon.....48
South Carolina.....49
Texas.....49
Virginia.....50
Washington.....50

VI. COMPARATIVE SURVEY OF AQUACULTURE LEGISLATION.51

VII. SUMMARY AND CONCLUSIONS.....59

PART I

PREFACE

While aquaculture has been practiced in the world for several centuries and oysters cultivated in British Columbia since the 1920's, it is only recently that the scale of development, particularly regarding salmon farming, has focused the awareness of the public and the business community on aquaculture. Further, scientific knowledge is expanding rapidly, and new species, such as sablefish and scallops, are now candidates for commercial husbandry. Japan and China have historically used aquaculture to enhance domestic seafood production and recent American success with catfish culture has created new market demands in the country. However, the last two decades have also seen the evolution of large-scale production for export markets (e.g. shrimp farming in southeast Asia and salmon farming in Norway, Scotland and Chile). Quite clearly, aquaculture has become big business. Salmon farming in British Columbia is consistent with that trend.

In the context of Pacific Canada, the administration of the commercial fishery is a complex subject. The Government of Canada is responsible for managing fish stocks, protecting habitat and determining the terms and conditions of the harvest (who, when, where and how of fishing). While these questions are important to resource managers, the issuance of a licence clearly creates rights and obligations for licencees. When and how can a fisherman conduct his activity, buy a vessel, sell his catch, and sell or transfer his licence to fish? These same questions also arise in the context of aquaculture. What is aquaculture? Who is an aquaculturist? What terms and conditions govern a licencee?

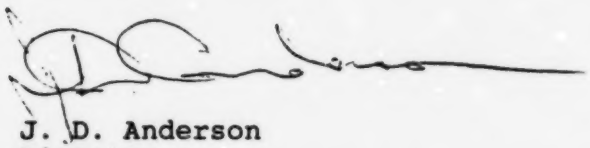
Our ministry is pleased to publish this report as a contribution to understanding the framework for administration of aquaculture, particularly in the context of Canada, a federal state with a federal-provincial sharing of jurisdiction.

The authors of this report are employed by Campney & Murphy, a large legal firm whose client base includes those from the fishery and aquaculture sectors. The primary authors, W. G. Wharton and D. McDougal (a law student) have both professional and personal interests in maritime and fisheries law. Their interest resulted in an unsolicited proposal which our branch was pleased to support.

Obviously, the subject chosen is complex and the attached report is a preliminary overview. However, it is written in

a manner that provides a general introduction to the subject of aquaculture legislation in this province, other Canadian provinces and other countries. For a more detailed review of the subject, readers are directed to the bibliography where a wealth of information sources are listed.

Generally, the report is a fair and accurate overview of policies and legislation in the Province of British Columbia. However, responsibility for material and opinions expressed are those of the authors and do not necessarily reflect the official position of the province.



J. D. Anderson
Director
Aquaculture and Commercial Fisheries Branch
October 1990

PART II

INTRODUCTION

Aquaculture in British Columbia is a recent phenomenon and has gained prominence with the rapid escalation of intensive salmon farming during the past 6 years. Although aquaculture, including salmon rearing, existed prior to this period, the industry ignited during the mid 1980's with an influx of foreign capital and expertise and has now become a prominent feature along much of the British Columbia coastline.

Although aquaculture is a recent development in British Columbia, aquaculture has been developing worldwide, and many other jurisdictions have had to grapple with many of the same concerns which are now being faced by the people of British Columbia. Although the problems in the industry are not the subject matter of this paper it is impossible to conduct any research in this field without some idea of the competitive forces which are structuring the industry. For a detailed discussion of the specific problems being dealt with, the reader should review the Gillespie Report or the Ombudsman Public Report No. 15 referred to in the bibliography provided.

These problems are as follows:

1. Raising capital and over-capitalization

2. Environmental concerns of water quality and interaction with wild stocks

3. Disease control and catastrophic losses

4. Marketing problems and competition within the world salmon market

5. Conflicts among other users of the resource, including upland owners

From a legal perspective, many of these problems originate as a result of the private utilization of what is traditionally considered to be common property resources, namely water and fish. There is very little in the common law which has application in the aquaculture scenario and most of the rights and obligations for those who participate in this industry must be found in the legislative framework of statutes and regulations.

To say that aquaculture is an unregulated activity in British Columbia is quite simply incorrect. Any individual

who has obtained an aquaculture licence or a tenure of Crown lands for the purpose of aquaculture can attest to the myriad of permits and statutory hurdles which are involved. It may even be correct to say that aquaculture is an over-regulated activity. Notwithstanding the aspects of aquaculture which are subject to legislative control, there do exist aspects which are not subject to direct legislative control and, if they are controlled at all, are controlled by a government agency as part of their operating policy or procedure.

The actual legislative response to aquaculture in British Columbia has, at least until quite recently, been non-existent. Aquaculture, until the advent of the Aquaculture Regulation, recently passed pursuant to the Fisheries Act, was regulated under general legislation dealing with fisheries and the tenure of Crown lands. Other jurisdictions have seen fit to pass specific legislation dealing with aquaculture and the goal of this project is in part to determine what features of the activity of aquaculture are subject to legislative control in other jurisdictions. Once these features are identified, the legislative framework in British Columbia can be analyzed to determine what legislative control or substantive or procedural rights are absent from the legislation of this province. Once these "gaps" are identified a determination can be made on whether these legislative features are appropriate to the British Columbia situation and whether the potential benefits of further legislative changes is outweighed by the costs associated with bringing any given piece of legislation into existence. In addition, the question of whether a specific act for aquaculture is warranted or whether changes to existing legislation can accomplish the same effect can also be considered.

Prior to an analysis of the applicable legislation it is necessary to briefly canvas the question of jurisdiction. This review will be brief as the practical question of jurisdiction over aquaculture in British Columbia has been resolved by a Memorandum of Understanding between the two levels of government involved. The status of the Memorandum will be considered. After a review of legislation affecting aquaculture in British Columbia and a review of legislation in other jurisdictions, legislative "gaps" will be identified and discussed.

Before proceeding the writers would like to acknowledge the financial assistance and support provided by the Ministry of Agriculture and Fisheries of the Province of British Columbia. The funding for this research was arranged by the Director of the Aquaculture & Commercial Fisheries Branch, Jim Anderson, in recognition of the need for such an analysis. The writers would also like to thank L. Michael Coon and Brenda M. Dixon for their assistance and advice.

Although funded by the provincial government, the views expressed in this report are those of the authors and should not be considered as indicative of government views or policy.

PART III

JURISDICTION OVER AQUACULTURE

INTRODUCTION

In Canada we have two levels of government which can create valid legislation in areas exclusively reserved to them in the Constitution. Part VI of the Constitution lists the distribution of governmental legislative power. Aquaculture is not included on the list. Since it is established that all legislative powers have been conferred through the combination of federal and provincial powers, then aquaculture must fall under one of the listed headings. The legislative power within which aquaculture falls is a matter which may ultimately be decided by the courts but at the moment it is only a matter of opinion.

JURISDICTION OVER AQUACULTURE

A. Constitutional Jurisdiction

B.H. Wildsmith conducted an extensive analysis of the case law in order to resolve the question of jurisdiction as it pertains to aquaculture.[1] He posited four possible constitutional powers which would allow either the federal or provincial governments to make laws in regards to aquaculture as follows:

1. Aquaculture is in relation to sea coast and inland fisheries (s. 91(12)).

2. Aquaculture is in relation to property and civil rights in the province and/or a matter of a merely local or private nature in the province (s. 92(13), (16)).

3. Aquaculture is in relation to agriculture (s. 95).

4. Aquaculture is a new subject matter, not envisioned in 1867, and so is not included in any of the heads of power specifically enumerated in the Constitution. As such it falls within the federal general power to make laws for the peace, order, and good government of Canada.

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[1]Wildsmith, B.H., Aquaculture: the Legal Framework, Edmond-Montgomery Ltd., Toronto, 1982.

After a considerable doctrinal analysis, Wildsmith concluded that neither the third or the fourth powers are appropriate with regards to aquaculture. He feels that the term "agriculture" emphasizes land, soil, crop and livestock considerations and is restricted to situations displaying some of these features. Also, aquaculture is not a matter of national concern at present and, therefore, it should not be drawn under the general power of the federal government to make laws for the peace, order, and good government of Canada.

The other two constitutional powers reflect the traditional controversy as to the distinction between s. 91(12) and s. 92(13) of the Constitution with regards to Fisheries. Several authors have considered this distinction for the coastal fisheries.[2] Few, however, focussed on the question as it pertains to aquaculture.[3] The conventional wisdom at present is that the federal government's role in the control of aquaculture is limited only to the relationship between the management of the wild fishery, and any direct and

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[2]Among them are included Wildsmith, B.H., Aquaculture: The Legal Framework, Edmond-Montgomery Ltd., Toronto, 1982; Scott, A., "Regulation and the Location of Jurisdictional Powers: The Fishery". Osgoode Hall Law Journal, Vol. 20, No. 4, 1982, p. 780-805; VanderZwaag, D., "Canadian Fisheries Management: A Legal and Administrative Overview", Ocean Development and International Law Journal, Vol. 13, No. 2, 1983, p. 171-211; Wildsmith, B.H., "Federal, Provincial, and Municipal Government Roles in Aquaculture", a report prepared for the National Aquaculture Conference, Can. Spec. Publ. Fish. Aquat. Sci. 75, 1984, p. 104-112; Wildsmith, B.H., "Federal Aquaculture Regulation", a report prepared for the Department of Fisheries and Oceans (D.F.O.), Can. Tech. Rep. Fish. Aquat. Sci. 1252, 1984; Wildsmith, B.H., Spears, K.J., Wharton, W.G., "Individual Entitlements in the Tidal Fisheries: Some Legal problems", a report prepared for D.F.U., 1885; Stancil, D.E., "Provincial Jurisdiction Over Living Aquatic Resources Within the Province of British Columbia", a report prepared for the Fisheries Branch, Min. of Env., 1985; Huestis, L.B., "An Analysis of Provincial Jurisdiction and Legislation over Aquatic Resources within the Province of British Columbia", a report prepared for the Min. of Env. and Parks, 1986; Harvey, C.E., "Allocation of the Fishery: Where Does Federal Authority End and Provincial Authority Begin?", a report prepared for Continuing Legal Education (C.L.E.) seminar on Fisheries Law, 1987; and Tynan, G.B., "Aquaculture: the Constitutional Framework: Who's Minding the Shore?", a report prepared for C.L.E. seminar on Aquaculture, 1988.

[3]See Wildsmith, Stancil, Huestis, and Tynan, ibid.

deleterious effect which an aquaculture operation might have upon that fishery.

Federal jurisdiction for the protection and management of the fisheries, however, has been found to extend as far as infringing on property rights, such as prohibiting the commercial sale of fish.[4] The court felt that the regulation in question did not prima facie deal with "fisheries" but that it provided for a matter necessarily incidental to the subject of sea coast and inland fisheries.

Similarly, the province can create legislation respecting property and civil rights within the province which may incidentally affect fishery matters, but such legislation must be strictly limited to the control of property. For instance, the province may pass legislation regarding the fisheries in order to protect their land, the environment and the ecosystem.

It can be seen that some situations like aquaculture can have aspects which arguably are subject to both federal and provincial legislative authority.

Valid provincial and federal legislation can overlap. In such case, neither legislation will be ultra vires, unless there is a conflict between the two.[5] If the provincial legislation purports to do something that is contrary to the federal legislation, then the doctrine of paramountcy would require the provincial legislation to give way.[6] However, where the provincial legislation is compatible with the federal legislation, then both are valid.[7]

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[4]R. v. Saul, [1984] 55 B.C.L.R. 359 (B.C.S.C.). This decision was affirmed by the Alberta Court of Appeal in R. v. Crane, Favel and Twin, [1986] 1 W.W.R. 522, but it was distinguished in R. v. Widulich, [1988] 22 B.C.L.R. (2d) 238, where Locke J. felt bound by the decision but nevertheless went on to say "...in the absence of any evidence specifically linking the prohibitions to any likely harm to the fisheries... the impugned regulations may well be ultra vires" at p. 253.

[5]Hogg, P.W. 1977. Constitutional Law of Canada. Toronto: Carswell Co. Ltd., p. 129.

[6]A.G. of Ontario v. A.G. of Canada, [1986] A.C. 343.

[7]Interprovincial Co-Operatives Ltd. v. R., [1976] 1 S.C.R. 477 (1975).

Other areas which may affect aquaculture and are within the exclusive domain of the parliament of Canada to legislate include:

1. the regulation of trade and commerce interprovincially, internationally, and generally;[8]

2. the protection of shipping and navigation rights within the waters of the provinces and the Dominion;[9]

3. Criminal Law and procedure in criminal matters;[10]

4. the gathering of statistics of the industry;[11]

5. matters involving banking, bankruptcy and insolvency and interest;[12] and,

6. matters involving Indians, and lands reserved for Indians.[13]

B. Territorial Jurisdiction

The territorial limits of B.C. have been determined in the B.C. Offshore Mineral Reference,[14] and the ownership of the sea bed and subsoil between the coastal islands and the mainland of B.C. was found to be vested in the province (see the Strait of Georgia decision).[15] The question that was answered in the affirmative in the Strait of Georgia case suggests that all the lands including the mineral and other natural resources of the seabed and subsoil, covered by the waters between the islands and the mainland, are the property of B.C. However, Justice Dickson stated that:

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[8]Section 91(2) of the Constitution.

[9]Section 91(10) of the Constitution.

[10]Section 91(27) of the Constitution.

[11]Section 91(6) of the Constitution.

[12]Sections 91(15), (16), (19) and (21) of the Constitution.

[13]Section 91(24) of the Constitution.

[14]Reference re Offshore Mineral Rights of British Columbia, [1967] S.C.R. 792, 65 D.L.R. (2d) 353.

[15]Reference re Ownership of the Bed of the Strait of Georgia and Related Areas, [1964] 8 D.L.R. (4th) 161 (S.C.C.).

> "It is important to note that the question raised in this Reference is not concerned with legislative jurisdiction nor with political or economic considerations. No question arises as to the power of Parliament to legislate in relation to matters within its exclusive legislative jurisdiction as, for example, control over shipping, navigation, trade and commerce, customs, fisheries and defence. The sole question here is the matter of proprietorship in lands."[16]

With regards to aquaculture, this case is important because the areas that were in question are the prime locations for conducting the business of aquaculture. Since B.C. owns these sub-tidal lands, it is the provincial government who has the authority to lease them (including the use of the water column above the areas) and to collect rent or royalties from such leases for the business of aquaculture.

The extent of the provincial governments control of the territory seaward of the west coast of the province below the low watermark has yet to be tested judicially. One contention is that the limits of the coast are to be based on the principle of the "jaws of the land" concept rather than on the basis of a line which exactly matches the low water mark. This concept involves drawing straight lines from the most extreme promontories to connect each other. This would greatly increase the number of aquaculture sites under provincial control as sheltered areas where aquaculture is viable would be on the landward side of these lines.

C. Federal Jurisdiction

The federal power derives its legislative power from provisions under the Constitution dealing with fisheries, extraprovincial trade, shipping and navigation, criminal law, federal public property and areas outside any province, and the territorial areas under federal control. Thus the federal government may arguably legislate as follows:

1. the leasing of subaquatic lands and water columns that are the property of the Dominion;

2. the introduction of foreign species;

3. supplying or providing for the capture of wild stock;

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[16]Supra., note 3, p. 166.

4. the property rights of organisms outside of provincial boundaries;

5. fishing restrictions;

6. fish health inspection and controls over diseased fish;

7. predator control of marine and migratory birds;

8. aquaculture produce escape;

9. theft;

10. ocean ranching, especially for product travelling outside of the province;

11. the marketing and processing of produce for sale outside of the province;

12. marine insurance;

13. pollution as it may harm the wild fish stocks, and generally, in marine waters;[17]

14. reporting requirements;

15. navigation and shipping as it pertains to siting of the facility and compliance with the federal acts; and

16. loans, taxation, pilot projects, R. & D., and other stimulative measures.

D. Provincial Jurisdiction

The provincial government derives the preponderance of their authority from provisions under the Constitution dealing with property and civil rights, local works and undertakings, the management and sale of public lands belonging to the province and matters of a merely local or private nature, and territorial areas that belong to the province. The scope of these powers allows the provincial government to arguably legislate as follows:

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[17]The federal power's ability to legislate with regards to pollution generally in marine waters comes from a recent decision in the Supreme Court of Canada, R. v. Crown Zellerbach, [1988] 1 S.C.R. 401, where the majority felt that the pollution of marine waters, including provincial marine waters, is a matter of concern to Canada as a whole because of its extra-provincial and international character.

1. the leasing or licensing of subaquatic lands and water columns that are the property of the province;

2. the use of water within the provincial boundaries;

3. the construction of facilities;

4. the introduction of foreign species;

5. the supply of commercial or brood stock;

6. the transport within the province of facilities and stock;

7. the control of land and air predators;

8. the use of feed;

9. the marketing and processing of the product for sale within the province;

10. the general licensing of the business;

11. insurance;

12. pollution so as to protect the environment and ecosystem;

13. reporting requirements;

14. disease control and management;

15. loans, taxation, pilot projects, R. & D., and other stimulative measures.

E. Municipal Jurisdiction

Laws in relation to municipal institutions in a province are exclusively subject matters for the Legislature of the province.[18] In B.C., the municipalities are granted their powers under the Municipal Act. They have the authority to require business licences and zoning permits for industries within a municipality. Functions of a servicing nature which provide for water, sewage, local roads, fire, police, garbage collection, and so on, are also controlled by the municipalities. Thus their main influence is in the siting of aquaculture operations such as hatcheries. In addition to controlling location of aquaculture facilities, municipalities can also determine the size of lots, including those on Crown

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[18]Section 92(8) of the Constitution.

land, and such site development attributes as area covered by improvements and building height.

F. Memorandum of Understanding (MOU)

In September of 1988, the Government of Canada, as represented by the Minister of Fisheries and Oceans, and the Government of British Columbia, as represented by the Minister of Agriculture and Fisheries, signed a memorandum of understanding on aquaculture development. The document has three purposes:

1. to establish a mutual agreement to advance the orderly growth and development of the aquaculture industry in B.C.

2. to recognize that both Canada and B.C. have substantial interests in the prudent development of an economically sound aquaculture sector and the facilitation of investment therein; and

3. to identify and clarify the respective roles of each government in advancement of the aquaculture sector.

The agreement is limited to the exercise of private aquaculture and does not include ocean ranching, spawn-on-kelp, bait holding, and contracted Salmonid Enhancement Program activities. The MOU, according to those involved in the agreement, expresses the areas where each level of government can create valid legislation over the industry.

Federal

Under the agreement, the federal government may create regulations for:

- the leasing of federal Crown properties;

- the health of fish in aquaculture facilities (As it is aquaculturists must comply with Fish Health Protection Regulations and related instruments under the Fisheries Act (Canada));

- the conservation and protection of wildstocks and fish habitat with respect to aquaculture;

- the protection of navigable waters (This means that an aquaculture facility must seek approval under the Navigable Waters Protection Act);

- the issuance of permits for the collection of wild broodstock including eggs, milt, spawn, larvae, juvenile and adult of federally regulated fish; and

- the carrying out of sanitary shellfish water quality surveys, paralytic shellfish poison surveys, and product and other certification programs in accordance with all shellfish export requirements.

Canada must also

- undertake R & D related to the industry and communicate their results to B.C. and the industry;

- encourage the training of graduate students, post-doctoral fellows, technical or industry personnel;

- provide general and site-specific information regarding fish habitats;

- appoint qualified persons as agents for fish health protection purposes (Federal government must consult with B.C. prior to appointment and the persons are recommended by B.C.);

- monitor aquaculture products destined for human consumption for antibiotic residues, toxic materials and other additives or contaminants;

- specify quality or grade standards for interprovincial and international trade and inspect for compliance (This includes control over the exportation of molluscs);

- provide for fish feed requirements of the industry when allocating, harvesting and utilizing fish stocks and fish offal;

- make available small quantities of genetic material from wild salmon stocks to facilitate aquaculture broodstock development;

- regulate the use of therapeutic drugs and vaccines in aquaculture (Health and Welfare Canada and Agriculture Canada are to administer these two areas);

- collect, compile and publish annually, provincial statistics for aquaculture; and

- maintain Pacific and National Registries of fish diseases and important aquaculture stocks which are to be made available to the public.

Provincial

Under the agreement, the provincial government has the authority to establish regulations and policies for:

- the development and management of the industry;
- the licensing of persons and aquaculture activities;
- the size, spacing, density and location of aquaculture facilities and the use, content and enforcement of site-development plans;
- the marking and identification of aquaculture sites and structures other than for navigational purposes;
- the reporting requirements and the maintenance of records and documents;
- the qualifications, the performance and the financial standards for facilities;
- the protection of information confidentiality of licensees and applicants;
- the methods of harvesting, handling, buying, selling, holding and possession, offering or advertising for sale, or maintaining the quality of the product within the province; and
- the standards relative to the design, layout, construction materials and equipment of aquaculture facilities.

These areas are to be enforced by inspection solely by B.C. The province must also facilitate and encourage the development, provision and delivery of educational and on-the-job programs that will provide academic, technical and safety training for the industry and collect annually the data from aquaculture facilities relevant to production, distribution and sales and supply the info to Canada.

Areas Requiring Cooperation

Both levels of government are to cooperate and facilitate the development of the industry in a number of areas such as the exchange of information and facilitating R & D of the industry. However, the majority of the coordinating effort focusses on:

- the introduction, transfer and transport of aquaculture produce within the province;

- the isolation, quarantining and destruction or disposal of diseased or infested aquaculture produce and the disinfection or disposition of contaminated equipment;

- the standards of construction and operation of facilities and methods of handling, storing and using chemicals, fertilizers, vaccines, feeds, and other substances;

- the development of product quality standards;

- the importation or intra-provincial movements of aquaculture produce which might contaminate or infect natural species of fish, or introduce exotic species into the waters of B.C.;

- the inspections of facilities for compliance with the Acts, regulations and guidelines associated with the industry and the enforcement of such provisions;

- the monitoring of waste accumulation from aquaculture operations and the effects thereof; and

- the quantity of salmon eggs to be made available to the industry.

Other Provisions

The agreement sets out the formation of a Management Committee to coordinate the efforts of each level of the government and the industry, to identify activity and research priorities of the industry , and to resolve disputes arising between Canada and B.C. A dispute mechanism is provided for in the agreement for any such disagreements between Canada and B.C. and for the rectification of a regulation which is found to be ultra vires one level of government in a court of competent jurisdiction by the other level. The agreement may be amended at any time on mutual accord and terminated on one year's notice.

Status and Validity of the MOU

The MOU is basically a contract between two levels of government and is not binding on any non-contracting party. Each contracting party must create valid legislation pursuant to their respective constitutional powers in order to enforce their agreed upon obligations against any individuals.

The MOU on aquaculture between B.C. and the federal government was one of the last to be signed. The fundamental disagreement which slowed down the signing of the document was due to the B.C. government's position that the federal government cannot delegate authority that it does not have. The MOU was seen to be a delegation of authority.

Delegation in Canada between the federal and provincial legislatures cannot be direct[19] but must involve an indirect route. Hogg,[20] suggests that it is possible to delegate powers between the legislative bodies through administrative inter-delegation, referential legislation conditional legislation, or some mixture of these devices. Administrative inter-delegation involves legislatively granting the powers of the federal or provincial legislature to an administrative agency created by the other level of government.[21] Referential legislation involves adopting or incorporating certain laws of another jurisdiction within one's own.[22] Conditional legislation occurs where the laws of one level of government are conditional upon the actions of another level of government. Although Hogg feels that conditional legislation is valid, it has not come before the courts for determination.

The MOU derives its authority, federally, from the Fisheries Development Act, sections 3(2) & (3). Under section 8 of this act no agreement entered into pursuant to these sections of the act providing for the payment of any

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[19]The Nova Scotia Inter-delegation decision (A.-G. N.S. v. A.-G. Can. [1951] S.C.R. 31) effectively closed the door on a direct legislative delegation of powers because the inter-delegation would disturb the scheme of distribution of powers in the Constitution. There was no express authority in the Constitution which would allow for inter-delegation.

[20]Hogg, Constitutional Law of Canada (2nd ed.), The Carswell Company Ltd., 1985, p. 295-307.

[21]This was done in P.E.I. Potato Marketing Board v. Willis [1952] 2 S.C.R. 392, where the Governor General in Council delegated to a provincial marketing board the power to regulate the marketing of agricultural products outside the province in interprovincial and export trade, and was allowed by the courts.

[22]The leading case in this respect is A.-G. Ont. v. Scott [1956] S.C.R. 137, where the S.C.C. held that where the Ontario Legislature accepted whatever defences were specified by the Parliament of the United Kingdom, the statute that provided for this acceptance, is valid.

money by the Minister has any force or effect until such time as money has been appropriated by Parliament for the purpose of discharging any commitment under the agreement. The authority for the Minister of Agriculture and Fisheries of the province to enter into the agreement, is Order in Council No. 1653. The Order in Council was made under the authority of section 16 of the Constitution Act, and sections 7 and 4 of the Ministry of Agriculture and Food Act.

In all likelihood neither party to this agreement could have any of its provisions enforced in a Court of Law, nor would they likely adopt such an approach. Instead, the dissatisfied level of government would simply create legislation in order to rectify what they consider a problem. The courts could then decide if the legislation created is valid. If the court held that the legislation is invalid then there would be no other recourse. It could not force the other level to enact legislation, it can only withdraw from the MOU. Thus, it is unlikely that the agreement would ever be tested before a Court of Law through the action of either level of government.

A more likely scenario where a determination of the agreement's validity would occur, is if an individual were to question the jurisdictional basis for either level of government's legislative provisions. Were the court to find the enactment ultra vires, the legislating authority may suggest that the agreement was a form of inter-delegation. If that is the case, then to be valid it would have to be administrative delegation, referential legislation, conditional legislation or some mixture of these devices.

It is suggested that the MOU could not be considered administrative delegation because the administrative board created under the agreement has no power to create legislation, and only serves as a conferential and arbitration authority for the two levels of government. It would not appear to be referential legislation as there are no provisions under the agreement incorporating or adopting one level of governments authority by the other. However, the MOU may be thought of as conditional legislation as the whole nature of the agreement suggests that each level of government will attend to their own responsibilities under the agreement. In other words, the Province agrees to do certain acts on the condition that the Dominion does certain acts. However, as suggested earlier, conditional legislation may appear to be an infringement of the distribution of powers sections of the Constitution and therefore the agreement may be an invalid form of inter-delegation. Indeed, provisions in the agreement itself, lead one to conclude that the two levels of government never intended for the agreement to be an inter-delegation of power. Provisions exist for the enacting of legislation

which has been found to be beyond the jurisdictional powers of one level of government by the other level of government.

Also, in the preamble of the MOU it states: "that without prejudice to their respective Constitutional powers, the parties hereby agree." This suggests that neither party intended to delegate its authority to the other level through the agreement. Consequently, it is concluded that the MOU is not a valid form of inter-delegation and would not be an answer to a challenge on the basis of a lack of constitutional jurisdiction.

G. CONCLUSION

Regardless of the MOU, the respective legislative jurisdiction of the federal and provincial governments over aquaculture is listed in the summaries provided earlier. Each level of government may create valid legislation in each area listed under its authority for the suggested purposes or reasons enumerated. Consequently, the majority of the federal legislation as regards aquaculture would be in regards to protecting and conserving the natural fish stocks, and the majority of the provincial legislation would be in regards to property and civil rights. The MOU provides a workable solution to the jurisdictional overlap between the federal and provincial powers to legislate in this area, however, the MOU may be subject to attack by an aggrieved individual who might argue that the province is attempting to exercise jurisdiction which it does not have or the federal government is delegating authority which only it can exercise.

PART IV

EXISTING LEGISLATION IN BRITISH COLUMBIA

If we assume that the existing legislation is valid, then a number of statutory instruments affect the conduct and operation of the business of aquaculture.

A. Federal Legislation

The Fisheries Act (Canada) and its regulations are the major legislative tool employed by the federal government in the control of aquaculture. The scope of the Act can be found in its definitions of "fishery" and "fishing". "Fishery" includes:

(a) the places in Canadian fisheries waters where, and the times when, fishing and related activities occur, including such packing, transporting and processing operations as are within the jurisdiction of Parliament, and

(b) the persons engaged and the fishing vessels, fishing gear and other equipment used in the activities referred to in paragraph (a).

"Fishing" means fishing for, catching or attempting to catch fish by any method. No provisions expressly exclude aquaculture from any sections of the Act or its regulations. A summary of the provisions which may affect the conduct or operation of an aquaculture business are listed as follows:

1. The Minister may grant exclusive licences and leases to plant or form oyster beds and the exclusive right to any oysters produced or found on the beds.[23] However, where there are no distinctions in the regulations between the public and private fishing rights of fishing for oysters, the aquaculturist may be subject to size limits and restriction times;

2. Only individuals who have a valid personal commercial fishing licence may dig for or take shellfish;[24]

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[23]Section 58 of the Act. Section 59 gives the provinces the authority to grant oyster cultivation leases on Crown property.

[24]Section 19 of the Pacific Shellfish Regulations.

3. The Minister may close areas containing contaminated or toxic shellfish;[25]

4. A permit is required for taking or transporting contaminated shellfish;[26]

5. The Minister has the authority to restrict the placement of nets in the water or to require a licence for their placement;[27]

6. The Minister may set apart waters for the natural or artificial propagation of fish;[28]

7. The Minister may issue a license for the importation of fish and their eggs into the country or to another province only after they have been inspected and approved.

8. It is an offence to fish in areas covered by an exclusive lease or licence without the permission of the occupant;[29]

9. The Minister may require the placement and maintenance of screens or barriers to prevent the escape of fish held for breeding purposes;[30]

10. A license is required for lobster pounds;[31]

11. The use of explosives is prohibited;[32]

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[25]Ibid, Note 2.

[26]Section 6 of the Pacific Shellfish Regulations. Inspectors may examine any areas, places, facilities and equipment used for growing, transplanting, re-laying, transporting or storing shellfish.

[27]Section 6(1)(b) of the B.C. Fishery (General) Regulations.

[28]Section 57 of the Act. It is an offence to injury or destroy places set apart by the Minister (s.70).

[29]Section 23 of the Act.

[30]Section 26(3).

[31]Section 18 of the Act.

[32]Section 28 of the Act.

12. A licence is required in order to protect stock from predators such as harbour seals, elephant seals, sea otters or sea lions;[33]

13. A licence is required for the import, introduction, transfer or transport of fish or eggs within the province;[34]

14. Sockeye or pink salmon export is prohibited unless it is canned, salted, smoked, dried, pickled or frozen and has been inspected;[35]

15. Clams and geoducks must comply with packing regulations before export;[36]

16. A valid fishing licence is required for the sale of fish;[37]

17. A license is required for the harvesting of marine plants;[38]

18. The minister has the authority to administer licences and leases for fisheries or fishing wherever situated or carried on;[39]

19. No salmonid fry, parr or smolt are to be fished for, caught or killed at any time;[40]

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[33]Section 21 of the B.C. Fishery (General) Regulations.

[34]Section 30 and 31 of the B.C. Fishery (General) Regulations.

[35]Section 6, 7(2) and 7(11) of the Fish Inspection Act.

[36]Section 20 and 20.1 of the Pacific Shellfish Regulations.

[37]Section 37 of the B.C. Fishery (General) Regulations.

[38]Sections 44 through 47 of the Act.

[39]Section 7 of the Act.

[40]Section 12 of the Act.

20. The distance between stationary nets which are used for the capture of salmon, their placement and their length are regulated by the fishery officers;[41]

21. Fish ways, fish passages and navigable waters are to be free of obstruction or the obstruction may be removed and destroyed;[42]

22. A permit is required for converting fish to meal, manure, guano, fertilizer or oil.[43]

23. Fish are not to be destroyed except by fishing or as authorized by the Minister.[44]

24. The harmful alteration or the deposit of deleterious substances into waters frequented by fish except within the regulations set by the Governor in Council is an offence. The minister may require plans for any construction or work which may harm the habitat and has the authority to designate inspectors and analysts to test for compliance with the Act and the Regulations.

25. The fishery officers may set distances between fisheries and their boundaries.[45]

26. Fish suitable for human consumption are not to be abandoned and they are to be returned to natural waters.[46]

27. Possession or retention of Euchalons, Lingcod, Sablefish, Sole (lemon, rock or petrale) or Sturgeons except unless they are of a certain size and caught within a certain area is prohibited under the regulations.[47]

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[41]Sections 13, 14 and 15 of the Act. The nets must be a minimum of 250 yards apart.

[42]Sections 20, 24, 25 and 29 of the Act. The determination of whether an object or work is obstructing the passage is at the discretion of the minister.

[43]Section 31 of the Act.

[44]Section 32 of the Act.

[45]Sections 54 and 55 of the Act.

[46]Section 5 of the B.C. Fishery (General) Regulations.

[47]Sections 19, 20, 21 23 and 26 of the B.C. Fishery (General) Regulations.

28. Nets may not enclose any bay, cove or inlet except for those used to capture roe herring.[48]

29. No person may send salmon or steelhead trout upstream of a commercial boundary to any place downstream.[49]

30. No person may kill or injure fish by any means except in accord with the Act and the regulations.[50]

31. The importation, introduction, transfer or transport of live fish into any waters of the Province are restricted to certain classes of fish listed in the regulations and the activity may require a licence. Export restrictions are limited to Pollock or Pollock roe unless they are processed and packaged in accordance with the Fish Inspection Act.[51]

Other statutes and regulations make provisions for:

1. insurance for crops, equipment and facilities but there were no express provisions for federal compensation for a loss under the existing legislation;[52]

2. disease in animals and provisions for the destruction of the diseased animal and compensation to its owner but the definition of animal did not include fish;[53]

3. the registration and prescription of standards for feeds which includes feed for fish;[54]

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[48]Section 14(2) of the B.C. Fishery (General) Regulations.

[49]Section 28(1) of the B.C. Fishery (General) Regulations.

[50]Section 6(1)(a) of the Regulations.

[51]Sections 29, 30 and 31 of the B.C. Fisheries (General) Regulations.

[52]The Crop Insurance Act, Crop Insurance Regs., the Fishing Vessel Insurance Regs. (under the Appropriation Act), the Pesticide Residue Compensation Act and the Pesticide Residue Compensation Regs.

[53]Sections 11 and 12 of the Animal Disease and Protection Act and Regulations.

[54]The Feeds Act and Regulations.

4. financial assistance to fishermen but the legislation is ambiguous as to whether it applies to aquaculturists;[55]

5. the marketing of fish exclusively by corporations created under the acts;[56]

6. the inspection of fish at all establishments where fish are processed or stored for export[57]; and

7. theft from oyster beds and animals which may be of special interest to the owner.[58]

B. Provincial Legislation

Areas of aquaculture under provincial control asserted under the Fisheries Act and Regulations include:

1. the licensing of anyone conducting the business of aquaculture;[59]

2. the collection of records of transactions with fish suppliers;[60]

3. the licensing of kelp harvesting;[61]

4. the introduction, transport or destruction of oysters in oyster beds except by special permission;[62]

5. the marketing of oysters taken from a contaminated area unless they have been depurated;[63]

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[55]The Fisheries Development Act, the Fish-Chilling Assistance Regs., the Fishery Storage Regs., the Fishing Vessel Assistance Regs., the Fisheries Improvement Lands Act and Regs., and the Fisheries Prices Support Act.

[56]The Freshwater Fish Marketing Act and the Saltfish Act.

[57]The Fish Inspection Act and Regs.

[58]Sections 322 and 323 of the Criminal Code.

[59]Section 13(4.1) of the Fisheries Act (B.C.)

[60]Section 20 of the Fisheries Act (B.C.).

[61]Section 24 of the Fisheries Act (B.C.).

[62]Section 8(1) to 8(3) of Reg. 140/76.

[63]Section 8(4) of Reg. 140/76.

6. the harvesting of oysters from vacant Crown foreshore for domestic consumption only unless he has a permit;[64]

7. conducting oyster culture in Pendrell Sound;[65]

8. the licensing of fish buying stations;[66]

9. the keeping of records on the appropriate form and submitting a copy on a weekly basis to the Dept. of Fisheries and Oceans (Canada);[67]

10. the registration of anyone engaged in the business of the culture of shellfish from a leased or licensed area who is required to file an annual return.[68]

11. a general regulatory control exercisable by Order in Council concerning safe and orderly aquaculture and for the safe and orderly distribution of fish and aquatic products.[69]

Aquaculture Regulations

Aquaculture Regulation (B.C. Reg. 364/89) was approved in late 1989 and for the first time the Province has regulations specifically for Aquaculture. These regulations deal specifically with the following:

1. The activity of aquaculture is restricted to licenced locations. The licence itself will contain a set of terms and conditions which define the extent of the licence granted by the Crown. (Refer to form of licence currently in use in Schedule 1).

2. The term of any licence is 12 months renewable if re-applied for 60 days prior to its expiry.

3. Possession and dealing with fish or aquatic plants is restricted to those with licences unless the fish or

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[64]Section 8 of Reg. 140/76.

[65]Section 11 of Reg. 140/76.

[66]Section 18 of Reg. 140/76.

[67]Section 20 of Reg. 140/76.

[68]Section 2(1) and (3) of the Shellfish Regs. 11/83.

[69]Section 26 of Reg. 140/76.

aquatic plants are used as security for a loan in which case the holder of the security can deal with the fish or plants for the purpose of realizing on the security.

4. The release of fish and aquatic plants is controlled and there is a duty on licence holders to prevent and report such escape. Any recapture or attempts to recapture must also be reported.

5. Inspectors are appointed and empowered to inspect aquaculture facilities and records.

6. Fees are charged for licences.

7. Holder of licence is required to keep records of drugs administered to finfish and provide a statement concerning use of drugs when fish are delivered for processing.

8. All finfish must be delivered to and processed at provincially-licensed processing facilities that are also registered by Department of Fisheries and Oceans.[70]

These regulations are restrictive in nature with the exception of the right of a security holder to deal with the fish in order to realize on the security.

In addition, it should be noted that the Aquaculture Licence contains a comprehensive set of general terms and conditions. These are shown in Schedule 1.

There are a number of other non-fishery enactments which have an influence on aquaculture.

Other Provincial Legislation Affecting Aquaculture

Assessment Acts

All floating structures, etc. and land covered by water is taxable.

Environmental Management Act

The Minister may require the submission of an environmental impact assessment. Inspectors have a right to entry and to search and seize anything where an offence is believed to be committed. Annual fee for sampling and data collection is to be paid as a requirement of an order, permit

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[70]The rationale for this would appear to be that farmed fish must be available for Federal inspectors to sample and test for drug residues.

or licence under s. 8, 9, 13 and 22 of the Waste Management or s.4 and 5 of the Environmental Management Act.

Fish Inspection Act

The Fish Inspection Act (B.C.) provides for the regulation of all activities associated with the handling, processing and marketing of all fish products within British Columbia. In terms of aquaculture products, the Act provides authority to regulate processing and handling, prescribe grades and standards, and control different aspects of fish marketing within British Columbia.

Currently, neither Act nor Regulations make any distinction between wild-caught and cultured products. By policy, all farmed fish must be handled, processed, labelled and inspected according to the same regulations as for wild fish.

Fish Inspection Regulations

Fish may be detained for inspection and may not be sold until a certificate is issued and so long as seller has a licence. Minister may issue licences for buying or selling of fish if establishment complies with regulation standards. Non-canned fish are required to be labelled. The schedules provide standards for the construction, operation and equipment requirements of fish-handling establishments.

Islands Trust Act

Makes recommendations to the Lt. Gov. in Council for land use. Municipalities must abide by the trust's by-laws. Trust may play a role in siting requirements.

Land Act

Provides for the administering of Crown Land and its disposition. For sale of land below the low water mark an order of the Lt. Gov. is required. The Minister of Crown Lands may grant leases or licences of occupancy of Crown land for aquaculture. A clear distinction must be drawn between the licence/lease required of the Land Act and the licence required by aquaculturists under the Aquaculture Regulations discussed above. These are 2 separate pieces of legislation and the licences are separate and distinct. In short, aquaculturists operating on Crown land must be authorized under both Acts and will have both an aquaculture licence (under the Fisheries Act/Aquaculture Regulations) and a licence of occupation or lease (Land Act).

For administrative purposes, all applications for aquaculture tenures made to Ministry of Crown Lands are referred to Ministry of Agriculture and Fisheries for review and recommendation. A prerequisite of application is the need for aquaculturist to prepare and submit a development plan detailing species to be grown, type of operation, relative volume of production. This data is critical to determine if proposed type and scale of operation is appropriate to proposed location. If approved, the regional office of the Ministry of Crown Lands may issue a tenure to authorize site development, capital works, schedules of improvements, etc.

This same "approved development plan" is also used by Ministry of Agriculture and Fisheries as the basis to issue Aquaculture Licenses. Normally, no further documentation is required. Ongoing adherence to this plan and submission of annual production reports are required by the Ministry for issuance and renewal of aquaculture licences. In this manner, administrative procedures bridge two separate legislative enactments and try to minimize paper burden to aquaculturists.

Animal Disease Control Act (formerly called the Livestock Disease Control Act)

Gives inspectors authority to enter and inspect premises, notify owner of diseased animal, and quarantine or destroy diseased animals. The definition of "animal" includes fish, aquatic vertebrates, and aquatic invertebrates at all stages of their development or life cycle and approved schedules designate reportable diseases. To date, no diseases of aquatic animals have been listed in the schedule.

Natural Products Marketing (B.C.) Act

B.C. Oyster Marketing Scheme 1964 (B.C. Reg. 5/65) gives the board authority to promote, regulate and control all aspects of marketing of oysters including transportation, packing and storage. The B.C. Oyster Board issues licences and requires the submission of monthly production statistics and royalty payments.

Waste Management Act and Regulations

The Aquacultural Waste Control Regulation (B.C. Reg. 470/88) requires a permit to deposit deleterious substances into the environment unless the aquaculturist meets the requirements of s.3 of the Aquaculture Waste Control Regs. 470/88 and supplies information about discharge to the Regional Waste Manager. The regulations define basic requirements for

waste handling, reporting and monitoring. The complexity of required monitoring increases with the scale of production.

Water Act

Licence fee and rental required for use of surface water as set out B.C. Reg. 204/88. The allocation and use of ground water is currently unregulated in British Columbia.

Wildlife Act

Minister may set aside land as a wildlife area for the protection of fish and may claim a right of action for damage to such an area.

Municipal Act

Sets out the powers and authority of the municipalities within the Province. They may require a business licence and zone areas restricting the business of aquaculture. Similarly all by-laws are enforceable under the Offence Act for contravention. They may make by-laws and regulations with regard to wharves, docks, warehouses, and for obstruction and waterflow and for public health protection.

Health Act

The Lt. Gov. in Council may make regulations for the prevention, treatment, mitigation and suppression of disease and provide for and regulate the inspection, licensing, method of constructing, furnishing, equipping and maintaining, cleaning and disinfecting all places where animals are killed and fish are processed for sale as food. Regulations enable public health inspectors to inspect all facilities which process or sell food, including fish and shellfish.

Offence Act

Provides for the contravention of any enactment within the Province including penalties, searches, seizures, issuing of tickets and so on unless expressly provided for under the specific act.

PART V

LEGISLATION IN FOREIGN JURISDICTIONS

In order to assess whether British Columbia legislation is comprehensive we will now look at the designated legislation of other jurisdictions.

NOVA SCOTIA: AQUACULTURE ACT

Interpretation:

Includes definitions for aquaculture produce, aquaculture, brackish water, deleterious substances, feed stock, seed stock, sub-aquatic land, substance and water column.

Generally:

The Act's primary function is to encourage and promote aquaculture. The Act gives the Minister of Fisheries the powers and authority to:

- recommend areas for aquaculture development;
- give notice of provisions for, and conduct public hearings on development areas;
- conduct studies of deleterious substance levels in areas and to produce in certificate form a record of these levels;
- grant aquaculture licenses.
- Grant leases for Crown land giving the lessee the exclusive use, for aquacultural purposes, of the water column and sub-aquatic land but the grant does not convey mineral rights;
- require the submission of basic information regarding the nature of the operation, its technical requirements, the quantity and source of freshwater, the nature and extent of deleterious deposits, and the measures to be taken to reduce the deposits;
- amend licenses at any time for any false representations made in the application or if the licensee does not show due diligence in fulfilling the licenses terms and conditions;

- create a property interest in the stock while within 100 m of the area boundaries;

- appoint inspectors who may deny the cultivation or use of a species or feed stock after preliminary inspection; enter, search and investigate areas for compliance with the Act, regulations and terms and conditions of a license; request the furnishing of information on the conduct of the business; and destroy stock which is infected with disease or parasites, or are not authorized for cultivation;

- appoint a registrar who is to keep the records and documents which are to be open to the public, unless otherwise requested by the licensee, submitted by the licensee;

- make comprehensive regulations pursuant to the Act.

Penalties:

Any contravention of the Act or regulations is an offence and the accused may be liable on summary conviction.

NEWFOUNDLAND: AQUACULTURE ACT

Interpretation:

Includes definitions of aquaculture, aquaculture facility, aquatic plants and animals, land, sea ranching, site, strain and water.

Generally

The main purpose of the Act is to govern the conduct of aquaculture within the province by promoting the industry, securing property rights, minimizing conflicts and co-ordinating federal and provincial co-operation.

Through the Act, the Minister of Fisheries is given the powers and authority to:

- incorporate a development plan; set standards for the utilization, stocking and production of the facility; provisions for riparian access through a site; measures to be taken to prevent the escape of stock, the development and the spread of diseases and parasites, and measures to minimize damage to the environment or other facilities within an aquaculture licence;

- restrict the transfer or introduction of live aquatic animals or plants within the province unless it complies with the Environmental Assessment Act;

- establish a Registrar;

- appoint inspectors with broad powers to investigate, quarantine or destroy stock;

- require a report of a disease or parasite outbreak at a site;

- create a property interest in stock within 100 m of the site boundaries;

- regulate the conduct of the industry by incorporating public input into siting decisions and methods of handling, buying, selling, holding, etc. aquatic plants or animals;

- amend a license at any time or to suspend a license for any breach of a term, or condition, of the Act, or its regulations; and may cancel the license where the breach is not corrected, is repeated, or the licensee ceases to have a legal interest in the area.

Penalties:

Offenses include harvesting the stock without the licensee's consent, obstructing an inspector, and any contravention of the Act, or its regulations, or any terms or conditions of the license. The accused may be liable on summary conviction.

NEW BRUNSWICK: AQUACULTURE ACT

Interpretation

Includes definitions of aquaculture, aquatic plants or animals, site, strain, land, water, person and designated aquaculture land.

Generally:

The Act contains provisions for:

- the appointment of a Registrar to grant licenses which are subject to terms and conditions. The Registrar may suspend or revoke a license if the licensee supplies false information, violates the Act, or the regulations, or the license's terms or

conditions or fails to exercise due diligence in fulfilling the license's terms and conditions;

- the appointment of inspectors who may inspect facilities, demand records, take samples and carry out tests of a licensee's operation;

- the designation of land as aquaculture land and the granting of occupation permits or leases over these areas for aquaculture purposes;

- appealing decisions of the administration;

- the display of the license, the disposal of contaminated products and the transfer or assignment of a license.

Penalties:

Include violations of certain sections of the Act and provides for a hierarchy of punishments in accordance with the Summary Convictions Act.

NORWAY: ACT NO. 68

Generally:

The purpose of the Act is to contribute to the balanced development of the fish breeding industry and to help it become a profitable and viable regional industry.

- The scope of the Act is broad and encompasses the handling and feeding of fish and includes provisions for fish consumption, feed production, reproduction, release, research and education.

- The business is licensed and is subject to the terms and conditions provided. Limits on the size of the operation, the species to be raised, and certain ownership conditions are incorporated as conditions.

- The granting of a license is determined by three criteria:

  (i) disease outbreak and transmission possibilities (compliance with Fish Diseases Act);

  (ii) pollution risks (compliance with Pollution Act);

(iii) location conflicts with established activities and the surrounding environment (compliance with Harbour Act).

- Aquaculturists may recapture escaped stock in the vicinity for up to 14 days.

- Licensee's must provide all information requested by the authorities who have complete access and investigative authority to the facility.

- Authorities may withdraw a license where the facility is causing substantial environmental harm.

- Authorities may make exceptions to the Act in extraordinary circumstances and may allow for the movement and temporary relocation of the facility.

HONG KONG: MARINE FISH CULTURE ORDINANCE, 1983 c. 353

Generally:

The Act gives the Director the powers and authority to:

- designate areas as fish culture zones and to specify the sites contained therein;

- prohibit culture activities outside of designated culture zones;

- grant permits for scientific or wild stock restocking activities and to grant licenses for culture within culture zones, subject to terms and conditions on the use of the site, area and equipment;

- refuse to issue or to cancel licenses at any time with notice and reasons;

- direct the licensee in the disposal or destruction of any diseased fish or waste matter;

- grant a right to the land and water use as provided in the ordinance, license or permit;

- make regulations for the control of fish culture;

- board, inspect, make arrests, search and seize anything used or suspected of being used in the commission of an offence and to sell or dispose of the seized items.

Penalties:

Offenses under the ordinance include the pollution of waters so as to cause harm to fish in fish culture zones; damaging a site or removing fish or equipment from a site; locating a vessel in a fish culture zone; or obstructing an officer or the Director. Fines may be as severe as $20,000 or imprisonment $or one year for not having a license or polluting the waters.

GREAT BRITAIN: Fisheries Act, 1981 and Disease of Fish Act, 1937.

Interpretation:

Definitions include fish farming, business of fish farming, fish, foodstuff for fish, infected fish and infected waters.

Generally:

- Part IV of the Fisheries Act, 1981 contains provisions relating to fish farming. In particular, s. 31 empowers the Minister to make financial assistance available to fish farmers.

- Various offenses under the Salmon and Freshwater Fisheries Act, 1975 are excluded in relation to fish farming where exemption is conferred by the Minister but no regulations conferring general exemptions for these purposes have yet been made.

- The registration of fish farming businesses is provided for under the Disease of Fish Act, and it prohibits the unlicensed import of freshwater fish and eggs.

- The Live Fish (England and Wales) Act, 1980, as amended, confers on the Minister the power to prohibit or control by license the import, keeping or release of live fish, shellfish or eggs of any foreign species potentially harmful to freshwater fish, shellfish or salmon or their habitat, in England and Wales, but no order in exercise of that power has yet been made.

- The Disease of Fish Act, 1983, s. 7, empowers the Minister to make an order requiring certain information if it appears necessary in order to obtain information for preventing the speed of disease among fish.

- The Fish Farming (Financial Assistance) Scheme 1984 [1984/341] provides for the making of grants for fish farming projects, where it would appear to be desirable for the purpose of the reorganization, development or promotion of fish farming, and for the purpose of enabling a person to benefit from EEC Council Regulation 31/83 on an interim common measure for restructuring the inshore fishing industry and aquaculture, or EEC Council Regulation 2908/83 on a common measure for such purposes (Reg. 31/83 relates to projects for fish farming in salt or fresh water). Both Regulations provide for grants of up to 25% of the investment. The maximum amount of a grant under this scheme is 5% of the investment. If the expenditure has been approved for the purpose of any other grant out of United Kingdom public funds, the maximum amount of the grant is reduced proportionately. Approval of expenditure may be revoked and grant recovered in certain circumstances.

- The Diseases of Fish Regulations, 1984 [1984/455] prescribe the form of license to import live fish and eggs. An application must be made in writing in such form, and contain such information, as the Minister may require. They describe means of notice to be published and sent to the water authority in the designated area, the occupier of the fish farm existing in the area and to anyone else farming in the area. Notice is to be given when an inspector suspects an area is infected and the Minister shall direct the destruction of any fish or eggs, etc. seized as a result of a contravention of the Act.

- The Registration of Fish Farming and Shellfish Farming Business Order 1985 [1985/1391] requires any business conducting aquaculture to register with the Minister in writing, noting the particulars relating to the business. Any change of the particulars requires notice to be submitted to the Ministry within one month of the change. Records are submitted annually and kept for three years minimum. Transactions are to be recorded within 24 hours of their performance.

Penalties:

Offenses include submitting false information, obstructing an officer, failing to submit records and other general offenses for contravention of the Acts, regulations

or terms and conditions of licenses or permits. Penalties are on summary conviction basis.

NEW ZEALAND: Fisheries Act and the Freshwater Fish Farming Regulations 1983/278

Generally:

- Fish farms are to be licensed and must comply with the Water and Soil Conservation Act, 1967 for the right to take or discharge water.

- Applications for a license are to be in writing specifying the kind of fish to be raised, the right of occupancy and other relevant information including: suitability, methods of operation, qualifications and experience of applicant, the resources available, and a plan describing the location, the premises, the layout, sources of water, flow patterns, and other permits, licenses, etc. necessary for ocean-ranching, the release and recapture sites.

- The Minister may issue a license, provide for terms and conditions, and allow the transfer of a license.

- The Director-General may approve the transfer or release of fish, the sale or disposal of excess fish ova, salmon and the use o$ feeds.

- A license shall specify conditions to be complied with, the species fish being raised, the location, conditions as to effluent discharge under Water and Soil Conservation Act, and shall expire after 14 years but it is renewable. The license is to be displayed at the site.

- An aquaculturist may possess, dispose and transfer raised fish, sell fishing rights to the general public to fish on site, capture salmon on site at certain times, and he must keep records and returns on the farms operation, report an outbreak of disease to the Director-General and comply with directions of a fishery officer for the treatment or disposal of diseased or genetically defective fish.

- An officer may instruct by writing the treatment or destruction of diseased or genetically defective fish, take specimens of fish, food, water, soil implements, etc., for examination, and inspect sites and records at reasonable times.

- There is to be no compensation for destroyed fish, no obstruction of officers and expenses incurred in treatment or destruction of fish by an officer are recoverable.

Penalties:

An accused may be liable on summary conviction for contravention of the regulations or conditions of the license which may lead to its cancellation.

AUSTRALIA

Queensland: Fishing Industry, Organization and Marketing Act, 1981 - 1989

The permit issued under s. 35A(2) of the Act allows the holder to harvest and sell the species reared for stocking private waters and for human consumption. The Authority may permit the taking, keeping, rearing, or sale of fish kept or reared for aquacultural purposes; the use of apparatus and vessels for like purposes; set aside lands and waters lying below low water mark as it thinks fit; and grant or refuse the issue of a permit. Provisions of the Act prohibit entry or interference with an area subject of a permit except for lawful purposes or for the purpose of navigation including anchorage and deem the fish kept or reared to be the property of the permit holder.

The regulations under the Act set out the application requirements which include an environmental impact statement, evidence of financial ability and the nature and extent of the methods intended to be used. The permit is to be in a prescribed form subject to terms and conditions imposed which may include prohibitions on subletting or renting any part of the area under the permit, the maintenance of corner markers and signs, the submission of a report and the upkeep of the premises.

The Department of Primary Industries has provided a guideline for applicants for aquaculture permits which lists information an applicant should supply, the assessment criteria for proposals, the types of permits available and where to lodge complaints or seek further information.

South Australia: Fisheries Act, 1982

Division III of the Fisheries Act, 1982 deals with exotic fish, fish farming and disease in fish. Section 50 prohibits the release of fish into waters without a permit subject to conditions. The Governor may make regulations

with respect to control of disease of fish and control of harm to the environment.

Division IV provides for leases and licenses for farms over Ministry lands under certain restrictions.

Regulations under the Fisheries Act [1984/118] set out the registration requirements and conditions to be complied with in order to protect the environment. It sets out the powers of inspectors to seize and destroy anything that may adversely affect the environment. Other provisions require the maintenance of records, and the communication of the outbreak of disease to the Governor.

Northern Australia: Fisheries Act, 1988 [1988/58]

The Act requires a license for aquaculture and it is subject to certain terms and conditions. The license may be amended, suspended or revoked with notice and is subject to renewal. Permits are needed for the release of fish, possession of noxious fish and the discharge of waste. Fisheries officers have the power to investigate, search and seize records or equipment. Records are to be maintained and kept confidential. The Director of Fisheries may set aside areas for aquaculture purposes and make regulations with respect to disease, stocking, waste treatment, food, inspection, licenses and marketing.

The Regulations provide control over the illegal taking of live fish, the imposition of implied conditions to the license, closed seasons, monthly returns, disease control, the labelling and marketing of fish products.

Tasmania: Fisheries Amendment (Marine Farming) Act, 1982 [1982/88]

Interpretation:

Includes definitions of marine board, marine farm, marine farming, marine plant, raft and structure.

Generally:

A person needs a license and a lease or permit to carry on aquaculture in State waters. The lease or permit are subject to terms and conditions but they grant the exclusive possession or right to occupy the area specified. An application for a license, lease or a permit to occupy must be made in writing containing particulars of the operation. A notice of the farm siting is to be published and complaints by affected parties are to be considered when granting. The Minister may refuse to grant the interest but

it is renewable if granted and may only be cancelled or varied if the holder does not use the area for aquaculture purposes, fails to maintain an interest in the area, has no license or if he commits an offence. As licensee he may appeal a decision to a magistrate.

The license gives absolute ownership of the species of fish specified while within the licensed area. The license lasts for 12 months and is transferable as are the leases and permits to occupy.

Inspectors are authorized to enter and investigate facilities for compliance and to give directions for the treatment and quarantine of diseased farms.

The regulations require the licensee to keep records of the operation which are to be made available for inspection.

Penalties:

Offenses include obstructing an inspector, submitting false information, harming or damaging a marine farm or its contents, obstructing a fish farmer, and any contravention of the Act, regulations or conditions of the license, lease or permit. Accused may be liable on summary conviction.

UNITED STATES

The United States Federal Government created the National Aquaculture Policy for the planning and development of the industry. The program is run through the United States Department of Agriculture, as the lead agency, but other federal departments and organizations are involved in aquaculture activities.[71] The program itself is not regulatory and does not deal with licensing operations, leasing lands, controlling species, diseases or inspections. Instead, it sets up a framework for aquaculture developments. Very simply, it appropriates money and sets up a planning and co-ordinating framework. Although no federal laws deal directly with private farming of fish, shellfish or marine plants, there are federal laws which deal indirectly with aquaculture in two areas: waters beyond state jurisdiction

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[71]These include U.S. Dept. of the Army (Army Corp. of Engineers), U.S. Dept. of Commerce, U.S. Dept. of Energy, U.S. Dept. of Health end Human Services, U.S. Dept. of the Interior, U.S. Dept. of State, Environmental Protection Agency, National Science Foundation, the Small Business Administration and the Tennessee Valley Authority.

and the conduct of research and development programs and federal hatcheries. Otherwise, the state has the regulatory control of aquaculture.

Of the 52 states twenty-three officially recognize "aquaculture" in their legislation.[72] Different measures have been taken by different states to deal with the legal/regulatory issues. Some have passed comprehensive aquaculture legislation; some have taken stopgap measures to deal with the most immediate problems; some have been influenced by opponents of aquaculture, and many are still mired in bureaucratic red tape. In general, the permitting procedure is time consuming and expensive. Often the state government is seen as adversarial rather than supportive of the industry. A brief review of some state initiatives follows.[73]

Alaska

Principal Opposition to salmon farming in Alaska comes from commercial fishing groups. Legislation to clearly authorize regulation of salmon farming was introduced in early 1987, but in May of that year, the Alaska legislature passed a bill placing a moratorium on issuing permits for salmon farming in open waters which is in effect to date. The Legislature has been debating on whether to stop the current moratorium but this failed to occur during the 1989 session. Draft regulatory amendments allowing for shellfish and aquatic plant farming in response to Senate Bill 514 have been submitted to the Attorney General's Office for review and final changes prior to filing with the Lt. Governor. The Bill sets out that a permit is required for acquiring, purchasing, selling, transferring or possessing aquatic farm products. The Commissioner may attach conditions to the permit to protect the natural fish and wildlife resources. No permits may be issued for raising Atlantic salmon. Criteria for issuance of a permit include suitable physical

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[72]These states are: Alaska, California, Connecticut, Florida, Hawaii, Illinois, Louisiana, Maine, Maryland, Massachusetts, Mississippi, Michigan, Nevada, New Jersey, New York, Oklahoma, Oregon, Rode Island, South Carolina, Texas, Utah, Virginia, and Washington.

[73]Invaluable source material was provided by A.W. Wypyszinski in his paper "New Jersey Aquaculture III: Legal Considerations in Aquaculture Production" p. 4 - 15 and the Ombudsman Report No. 15 on "Aquaculture and the Administration of Coastal Resources in B.C.", Dec. 1988, p. 54 - 67. Other information was provided by the various state departments dealing with aquaculture.

and biological characteristics, impact on the existing traditional fisheries or uses of fish and wildlife resources and habitat, and demonstrable technical and operational feasibility. Applicants must submit an application and a development and operation plan. A renewal or transfer of the permit is allowed but subject to reports on disease history, plan development, fee payment and a health inspection. An aquatic stock acquisition permit is required for gaining wildstock. A report of the outbreak of disease among stock must be communicated to the department within 48 hours. The department is allowed to inspect a facility during operating hours. The commissioner may lease tideland for aquaculture purposes but it is non-transferable. The issuing/renewal of the lease may be refused by the commissioner at his discretion for "good cause" but a written finding and explanation of denial must be provided. A hearing is available if there are complaints at the time of renewal.

California

The Department of Fish and Game is the lead agency for aquaculture in the state. They provide a guide of permits, licenses, laws and legislation to assist applicants. All aquaculture facilities are required to be registered annually and the valid registration is a condition of all aquaculture leases. Inspections of marine facilities are conducted by Fish and Game representatives.

The California Legislature has addressed such issues as selling aquaculture products irrespective of seasons, bay limits, or angling license provisions, and protecting coastal sites suitable for aquaculture.

Connecticut

Aquaculture in Connecticut is limited to shellfish and is controlled through the Dept. of Agriculture. The Commissioner of Agriculture may grant leases for the planting and cultivation of shellfish but this is subject to the public right to fish in established fishing areas. Most of the provisions involve protecting the natural beds and leased areas from harm due to pollutants, dredging, theft and other interference.

Florida

The Dept. of Agriculture and Consumer Services is the lead agency in encouraging aquaculture development in Florida. Provisions were made for the creation of an Aquaculture Review Council and an Aquaculture Interagency Co-ordinating Council to assist in creating legislation necessary to implement the state aquaculture plan.

Hawaii

Hawaii was the first state to have an aquaculture development plan. All aquaculture, however, is land based and the concept of ocean leasing is still in the development stage. Extensive studies have assessed suitable sites, technical resources, legal requirements, financing, marketing, and other aspects of the industry which have been integrated by the state. The result is a very co-operative and supportive government role in the industry.

Illinois

Illinois has created the Illinois Aquaculture Development Plan which is in Phase I now. This phase of the plan was to identify areas of research priority; identify federal and state agencies that impact the industry, and their regulatory roles; provide a guide of permits and licenses which may be required; and create the Illinois Aquaculture Development Act, which defines, aquaculture as part of agriculture.

Maine

The commissioner may lease coastal waters for aquaculture purposes. Under the legislation the lease is subject to certain terms and conditions and is not transferable. An application for a lease is to be written. It must describe the area to be leased, the species to be raised, the physical and ecological impact on existing and potential users, the degree of exclusive use required, and the source of the organism to be grown. In addition, it must include written permission from every riparian landowner, a map of the area, a list of riparian owners, and an environmental evaluation. A public hearing must be conducted and criteria for a grant are provided. The commissioner may make conditions on the lease and there is a preference list for competing interests. A lease may be revoked if there has been no aquaculture, if aquaculture has been conducted so that it is injurious to marine organisms, or for a violation of the lease conditions. The state reserves the right to prohibit a lease renewal if it is not in its best interest. A lease may be transferred but is subject to review as a new grant. The state's intention was to slow down the industry's growth in Maine.

Maryland

An aquaculture development plan was requested by the Maryland Aquaculture Taskforce in 1987. An Action Plan was developed and it identifies three broad strategies to

foster industry development. Administrative strategies include: identifying the Maryland Department of Agriculture as the lead agency to promote aquaculture development; establishing an Aquaculture Policy Committee; delineating the roles of the Maryland Depts. of Agriculture, and Natural Resources, and the University of Maryland for aquaculture; and identifying funding and financing mechanisms for aquaculture. Legislative strategies include identifying the legal impediments to the industry and the development of e comprehensive legislative package. Research, technology transfer and higher education strategies include researching market potential, technology development and extending education programs.

The Maryland Legislature subsequently approved new legislation which:

- authorizes the production, possession and sale of striped bass;
- restricts farming to "native" species of fish;
- gives regulatory authority to the Dept. of Natural Resources;
- requires fish farms over a certain size to undergo od and waste inspections; and
- requires inspection and certification of farm raised fish.

New Jersey

New Jersey, as it exists now, has no comprehensive legislation over aquaculture but has a number of statutes and rules that control the industry on an ad hoc basis. A recent report on the legal considerations of aquaculture in the state recommended the streamlining of the permit process akin to the one existing in Illinois. An Aquaculture Development Plan was also recommended. One objective of the Plan would be to develop a New Jersey Aquaculture Act.

Mississippi

The Mississippi Aquaculture Act came into effect in 1988 for the purpose of increasing opportunities for the cultivation and marketing of aquatic species, authorizing the leasing of state waters for aquaculture, assessing the feasibility of the establishment of an aquatic ventures center, encouraging development of commercial aquaculture parks, and authorizing the Department of wildlife Conservation to regulate and issue permits for aquaculture operations.

All currently recognized native aquatic plants, animals, and non-game fish may be freely produced and marketed by an aquaculturist unless specifically regulated elsewhere. If a marketing permit is needed to aid in selling such products in other states or countries, the Department of Wildlife Conservation is required to issue such a permit upon request. Otherwise, a cultivation and marketing permit is required for all non-native aquatic plants and animals, fish classified as game fish in Mississippi (with certain exceptions), endangered, threatened or protected species, or animals and plants which have been genetically modified by means other than breeding and cross-breeding. Permits may be renewed annually. A one stop permitting procedure is being developed for aquaculture activities.

New Hampshire

An aquaculture license issued by the executive director is required in the state and is subject to the terms and conditions as provided. The license may allow for ocean-ranching but fish must be marked. These fish lose their private property status while in the wild. The license is alterable at any time if the activity is not in the public interest or subject to orderly termination over 3 years but no release of fish is allowed during this period. Fish runs are to be maintained by licensees and the director may inspect a premise at any time for compliance. An application for a license must specify the species to be raised, a description of the project, the location and geography of the area and proof of riparian consent. A public hearing is conducted with respect to the location.

A licensee may acquire plants or animals and seed from other licensees in compliance with state laws. A report of the business operation is to be submitted annually.

Oregon

The Oregon Coastal Management Program (OCMP) is part of Oregon's statewide program for co-ordinated land use planning. The objective of the OCMP is to develop, implement and continuously improve a management program which will preserve, conserve, develop and restore the natural resources of the coastal zone. Local governments are authorized to adopt and implement comprehensive planning and zoning ordinances so long as they comply with state-wide planning goals. These plans are the primary mechanism for establishing long-term, site-specific land use policies and decisions. An appeal component is part of the management program in order to resolve conflicts over land use decisions.

Laws in relation to aquaculture relate only to salmon hatcheries requiring licenses, and limiting the release of fish into state waters.

South Carolina

The Wildlife and Marine Resources Department is responsible for aquacultural law enforcement and research and development co-ordination. The Department of Agriculture co-ordinates the promotion and marketing of aquaculture development and facilitates aquaculture permit acquisition. One application form to begin an aquaculture operation to be used by all permitting agencies is being developed.

Regulation of reciprocal hybrid striped bass aquaculture exists and permits the sale of this fish by qualified aquaculture operations. Each business must obtain a permit or permanent certificate for producing, processing or trafficking the fish. A system of tagging and labelling of product is required, and all retailers, including restaurants, must advertise species as "farm raised" and indicate the origin of the product.

Texas

Previously, the Texas Parks and Wildlife Department issued licenses and permits for shellfish culture, fish farms, brood stock collection and exotic shellfish culture. A bill was signed June, 1989 transferring this authority to the Department of Agriculture.

A shellfish culture license is necessary for culture of native crustaceans and molluscs species in private waters only. An application is to be made in a letter stipulating applicant's name, home address business address and the county where the business is located. A fish farm license is necessary for the culture of fin fish - lasts for 2 years and is renewable. The brood stock sourcing permit authorizes out-of-season collection from public waters of a limited number of shellfish or fin fish to serve as brood stock for culture operations. The application includes the type and number of each species, the proposed location, the method and time period of collection. The exotic shellfish culture permit is required if live exotic crustacean or mollusc species are transported into state waters for culture purposes to prevent the introduction of harmful non-native species to the established marine ecosystem. It lasts for one year and is renewable. An applicant must identify the type, number and source of the species, handling agents and location where they are to be held. Each shipment is tested for disease and allows for destruction of all exotic culture

animals if a release is imminent. Certain species of fish are totally restricted under the regulations.

The bill also contained provisions to develop and promote fish farm products, license and regulate processing plants. A fish farm fund was created. Penalties for violations of certain sections was provided for, including theft of cultured products. A license may be suspended and a licensee must keep records of the operation.

Virginia

Regulations issued by the Virginia Marine Resources Commission provide for the development of the hybrid striped bass culture industry. Aquaculturists must obtain a permit before beginning operations which requires facilities to be properly designed and constructed to prevent fish escape. The regulations also prevent the marketing of illegally caught wild fish under the guise of an aquaculture product by requiring the labelling of all farmed fish. Cultured products may be marketed year round.

Washington

Aquaculture is considered a branch of the agriculture industry in Washington for the promotion of aquaculture activities, programs and development. The Department of Fisheries provides diagnostic services and remedies for aquaculture disease problems.

A Bill enacted in 1985 provided for the establishment of an aquaculture development plan to promote the industry and to create standards for products sources and quantities. Rules for transportation, sale, processing and possession of fish were to be created to apply to those exempt from a license. Labels on products are required under statute. A disease control program provides for disease diagnosis, import and transfer control, stock certification, disease classification, treatment and stock quarantine or destruction, and the collection of disease history records. An aquaculturist is allowed a hearing for violation of an act, rule, regulation or condition of a license and is exempt from fishing restrictions on size, quantity and marketing times. In addition, he must register his business and provide statistical data. No salmon are to be released and aquaculture vehicles must be licensed.

PART VI

COMPARATIVE SURVEY OF AQUACULTURE LEGISLATION

In order to determine whether the legislative framework in British Columbia for aquaculture is adequate, a comparison of the British Columbia framework to other jurisdictions is used to identify legislative gaps. These gaps are then discussed to assess their utility in the British Columbia context.

Many jurisdictions have deemed it appropriate to have a separate act for the regulation of aquaculture, however, British Columbia has proceeded on the basis that existing legislation, with certain modifications, is adequate to the task. This approach has two immediate advantages as follows:

1. the legislative time and effort needed to bring new legislation into existence is saved and can be dedicated to other issues.

2. It avoids the tendency towards a one industry-one act legislative scheme. In such a scheme the Fisheries Act could easily be replaced by the "Herring Fisherman's Act" and the "Salmon Producer's Act", and each segment of the industry would be pushing for their own act.

The major disadvantage to the absence of a single comprehensive act for the aquaculture industry is the necessity of looking in several acts to determine the rights and responsibilities involved.

Notwithstanding the nicety of having a single source statute for the aquaculture industry, we have approached this analysis from the perspective of "if it ain't broke, don't fix it". In other words, unless it can be shown that some element is not adequately regulated by the existing legislative scheme and cannot be accommodated by an amendment to an existing act it will be concluded that an aquaculture act is not necessary at the present time.

A comparison of legislative provisions from jurisdictions in Canada, Australia and the United States can be seen in Table 1.

This comparison between British Columbia legislation and the designated legislation of these other jurisdictions indicates that most of the areas of operation legislated elsewhere are also the subject of legislation in this province.

There are some exceptions to this general observation as follows:

1. There is no provision in B.C. for designated aquaculture zones within which aquaculture is the primary activity.

Discussion: A number of the jurisdictions surveyed have enacted legislation which designates certain areas of the coastline to be aquaculture reserves or development areas. In these reserves, aquaculture is the primary activity and any potentially harmful activity by others is regulated. At present, it is left up to the individual aquaculturist to establish that an activity by some other person is harmful to the aquaculture facility and, if this activity is to be eliminated, the aquaculturist must apply to the court to establish that the activity is harmful and that the balance of convenience dictates that the activity of the other party should be controlled.

In the scenario where aquaculture reserves are established, it would be incumbent upon the individual who is carrying on the potentially harmful activity to show that there is no harm. In addition, the onus of protecting the aquaculture area from interference would not be borne by the individual aquaculturist. As other users of the resource would need government approval before carrying on potentially harmful activities, it would be the government who has overall control of the situation and the costs associated with the regulation of these aquaculture areas could be passed on through appropriate licence fees.

The absence of a comprehensive and functional mechanism for coastal resource planning and land-use allocation to deal with multiple use conflicts has been dealt with in some detail in a report by the Provincial Ombudsman. This issue is one not specific to aquaculture but also relates to other proposed uses including marinas and log dumps. (Refer to citation 20 in Bibliography).

2. There is no dispute resolution mechanism within B.C. to resolve various licencing disputes or to allow representation for other user groups.

Discussion: At present, if a decision is made concerning a specific aquaculture operation and the operator of that facility is aggrieved, the operator has no direct method of challenging the decision. It is possible for the operator to apply to the courts for judicial review of the decision, however, this judicial review is limited to a review of the procedure employed by the decision maker and does not concern the substantive reasons on which the decision is based. In

other words, the operator can not complain that the decision is wrong per se but only that he was not afforded the appropriate procedural protections prior to the decision being made.

Given the level of investment required to operate an aquaculture facility and the economic reliance on the aquaculture licence and land tenure, it would appear to be appropriate that the aquaculturist have some mechanism to challenge the substance of a decision if the decision is contrary to the purposes of the legislation or unnecessary for the promotion of the purposes of the legislation and not otherwise contrary to the public interest.

The dispute resolution mechanism could take the form of an appeal board composed of knowledgeable appointees who could access the decision in light of government objectives to determine if the decision is consistent with those objectives. This process will have a positive effect on investment decisions being made by the aquaculturist as the potential for arbitrary or politically motivated decisions will be reduced.

This process could also allow for the input of affected third parties who may feel that their rights are being adversely affected. These individuals might include upland owners or others using the resource who would otherwise have recourse only to the courts. There has by departmental practice been a level of input from interested third parties prior to issuance of an aquaculture tenure, however, after the granting of the tenure, the opportunities for third parties to be heard is relatively limited. The appeal board could hear complaints by interested third parties and amend the licence of the operator accordingly. The appeal board would also provide a forum for third parties to be heard should an operator wish to expand or modify his facility.

The overall effect of such a dispute resolution mechanism would be to reduce much of the frustration felt by operators who require amendments to their operating permits or otherwise feel that they have not been dealt with fairly. It will also reduce the level of frustration felt by interested third parties who may feel that they are not being heard prior to decisions being made which affect their enjoyment of the resource.

3. There is no protection for the aquaculturist outside of private remedies for those who interfere with his operation. Such remedies could include:

   (i) criminal sanctions for interfering with an aquaculture facility or stock.

(ii) civil remedies against any person who affects the water quality of the aquaculture facility including statutory recognition of claims for pure economic loss.

Discussion: With few exceptions there are no criminal sanctions for those who intentionally interfere with an aquaculture facility. Many of these facilities are vulnerable to those who for whatever reason may wish to cause the facility harm or discourage the activity of aquaculture in some way. As part of a general recognition of aquaculture in this province there should be a criminal sanction for those who intentionally interfere with an aquaculture facility.

In addition, a right to claim damages from any person who affects the facility should be part of the legislation of aquaculture. This would allow recovery of provable damages without proof of negligence and would also allow recovery for the costs of protecting the facility from imminent danger even if no actual damage occurs. For example, if a spill of some toxic material occurs and the aquaculturist is forced to harvest his stock early or is unable to sell his stock due to marketing problems caused by the spill, recovery would be allowed. As such claims are ordinarily categorized as claims of "pure economic loss", recovery would not be allowed by a court of law without some statutory provision allowing for such recovery.

4. There is no exclusive right to the use of the sub-aquatic lands or the water column reserved to the aquaculturist in the legislation of B.C.

Discussion: The license of occupation of subaquatic lands granted by the province of British Columbia does not explicitly grant the holder the right to exclude others from the area covered by the grant or licence. This is most easily seen in the competing rights of the right to fish and the public's right to navigate. It is doubtful whether the provincial government can directly limit the right to fish or to navigate which are areas normally under federal government jurisdiction. This limitation may be of greater theoretical importance than practical purpose and could probably be rendered moot by a criminal sanction against interfering with an aquaculture facility. Any ancillary interference with navigation or fishing which might result from such a sanction would arguably not infringe on the federal governments jurisdiction and would accomplish the desired affect. Although a lease of subaquatic land does not specifically exclude other resource users, the lease does specifically confer a right to "quiet enjoyment". Such a right would entitle the holder to apply to exclude those users whose activities interfered with the

quiet enjoyment of the leasehold. Such a right would not likely be able to interfere with rights of fishing or navigation these being federally regulated activities which would supercede provincially created rights where a conflict arose.

5. There is no transferability provision for the tenure or right of a security holder to assume the tenure or correct deficiencies.

Discussion: As discussed earlier, aquaculture is a capital intensive business and the ability to secure adequate financing can be the end of an otherwise healthy operation. Much of the money needed by the fish farmer will go into feed and labour and, notwithstanding the large amount of assets required to run a modern farm, the sale of the assets of the farm will rarely be sufficient to satisfy the creditors of the farm should something go wrong. It is therefore essential to a potential financier or major creditor of a fish farm who is about to finance the operation, either directly or indirectly through trade credit, that the farm be capable of being sold as a going concern, if at all possible. Transferability would also ensure that the aquaculturist could redeem the value of his business if the business is sold as a major "asset" of the business is undoubtedly the licence to operate and the site tenure.

The provincial government has recognized this necessity to a limited extent by providing an exemption to those who take security against aquaculture stock to allow these persons to seize and sell the stock without possessing an aquaculture licence as required by the Aquaculture Regulation (section 5(2)).

There is no right conferred upon the financier or creditor to correct any deficiencies in the land tenure such as failure to pay fees to ensure the continuation of the tenure, nor is there any right to transfer the tenure or licence to a new buyer. The shortcomings in the legislation leave the transfer of the tenure at the discretion of the crown. This leaves the crown with absolute flexibility on whether to continue the aquaculture facility at the location in question, however, it does leave some doubt as to the value to a security holder of the fundamental asset of the operation.

In the fall of 1989 the aquaculture industry in British Columbia entered a crisis phase in its development. This crisis was brought about in part due to marketing problems and a disease outbreak in parts of the province. The largest single cause of the crisis was the price of salmon coupled with a glut on the world market for salmon. Unfortunately,

just as British Columbia's production was reaching significant levels and many farmers were experiencing, and depending upon, their first major harvests, the price of wild caught salmon fell far below the cost to the farmers of growing their salmon to market size. The result of this crisis was predictable. Many farms went into receivership, including the flagship operation in the province, Royal Pacific Seafarms Ltd. Major secured creditors of these operations began appointing receivers pursuant to the security instruments and these receivers went about trying to realize on the value of these assets.

To the credit of the provincial agencies involved, it was the experience of the authors of this report that the provincial government showed extreme flexibility in dealing with receivers and new buyers to assist these individuals in the transfer of these aquaculture facilities. It appeared to be the goal of the provincial government to do all that was possible to assist in maintaining these operations as going concerns. Transfers were facilitated generally after the prior tenant granted a form of quitclaim over the site in favour of the new tenant. The issuance of an aquaculture licence would appear to follow the granting of a tenure and, unless some extraordinary situation presents itself, there is no reason to suspect that this situation will change.

The flexibility of the provincial government has done much to minimize any concerns that lenders might have concerning the ability to transfer the facility as a going concern, however, the doubt still remains with respect to the future and the question of continuing government cooperation in this area. Should government policy change, and the transfer of these tenures become more difficult, the value of the assets would plummet and whatever security exists in the assets would be minimized. It is therefore still of critical importance that some sort of legislative guarantee exist in this regard, subject to such reasonable limits concerning transfer as are required to allow for adequate government control over the operation of the facility.

6. There is no provision for public input prior to the granting of an aquaculture licence or land tenure.

Discussion: The Aquaculture Regulations do not specify any requirement to notify affected persons prior to the grant of a licence for a given location, nor does it specify any right to make a presentation prior to the grant of the licence.

This deficiency gives rise to two immediate problems. Firstly, affected persons must wait until a licence or tenure is granted before attempting to have the operation restricted or removed and, secondly, the aquaculture operation must

generally make their original, and likely significant, investment and then hope that they can withstand the challenges of aggrieved parties who emerge at later dates.

If interested parties were given an opportunity to object prior to the licencing of the site, an informed decision could be made on whether to grant the licence and, once granted, the operator could rest assured that his licence is secure.

As in other areas, government policy has been used to alleviate this legislative deficiency. Ministry of Crown Lands policy and application process requires the posting of notices at proposed sites. All aquaculture applications must be advertised once a week for two consecutive weeks in a local newspaper and once in the British Columbia Gazette. In addition, for finfish culture, a letter must be sent by the potential aquaculturist to all land and tenure holders within one kilometer in either direction and 300 meters inland of the proposed site. The letter must request that comments are to be sent to the Ministry within 60 days.

Also, the Coastal Resource Interest Studies (CRIS) conducted by Ministry of Crown Lands have resulted in the identification of areas where a wide range of coastal user groups feel they could either not coexist with aquaculture or could coexist if certain mitigation procedures were followed. The Ministry has tailored its application procedure accordingly; i.e. it does not accept applications in areas designated "No Opportunity" and accepts application in areas designated "Limited Opportunity" only if the applicant has reconciled or mitigated the concerns of those groups or agencies that have expressed an interest in the area.

As aquaculture licences for crown land-based operations are not issued until after Crown land tenure has been issued, it is accurate to say that interested parties have had an opportunity to have their say prior to tenure or licence issuance although such imput is not contained in the regulatory framework.

7. There is no property interest granted in the fish although a right to recapture could be inferred from the Aquaculture Regulation.

Discussion: There is very little doubt that marine plants or animals within the confines of an aquaculture facility are the property of the operator to the extent that he can harvest them at will. This situation is less clear for stock which was at one time contained but has found its way into the marine environment at large.

Taking fish from the wild is in the broadest sense is the activity of "fishing" and this activity is controlled by the federal government pursuant to its constitutional powers over the "seacoast and inland fisheries".

It is arguably within the power of the provincial government to create an absolute property interest in the marine plants and animals which are the subject matter of the aquaculture operation including a right to recapture them after an unintentional release. Although the provincial aquaculture regulations provide that recaptures or attempted recaptures must be reported,there is no right conferred to make such attempts. As the recapture of these plants and animals would arguably not interfere with the federal government's obligation to conserve the wild stock, this right of recapture may not be seen to be an infringement of the federal governments constitutional power. How this issue would be decided by the courts is far from certain.

Certain controls, such as the reporting requirement already in the Aquaculture Regulations, would have to exist to avoid abuses of this right and to ensure that wild stocks are not affected.

An alternate legislative solution would be to have the federal government amend the Fisheries Act to allow for limited recapture rights for those licenced under provincial legislative schemes, again specifying that these recaptures be reported and sanctions for those who abuse these rights.

8. There is no obligation imposed to report disease occurrences.

Discussion: Although the Aquaculture Regulations require the reporting of any escapes of aquatic plants or fish, their is no obligation imposed to report disease outbreaks. This obligation could be important in controlling disease and compiling data on various areas to help predict the timing and parameters of these problems. Provisions for the certification, importation and transplant of fish stocks is regulated pursuant to the Canada Fish Health Protection Regulations which are administered by a federal-provincial committee.

Further, the Animal Disease Control Act (B.C.) has included "fish" in definition of animal. However, to date, no fish diseases have been listed on schedule of reportable diseases. It is likely that either or both of these enactments could provide a means to implement an administrative framework for either or both objectives of protecting health of wild fish stocks and/or cultured stocks from risks of diseased stocks, whether juvenile or adult stages.

PART VII

SUMMARY AND CONCLUSIONS

At the present time there are several statutes which govern the activity of aquaculture in the province of British Columbia. Notwithstanding that these enactments cover most of the legislative ground when compared to the scope of legislation in other jurisdictions, there are certain significant "legislative gaps" where the rights and obligations of aquaculturists and their financier's are unclear or inadequate. These "gaps" have for the most part been accommodated through administrative flexibility or tolerance or left to private dispute resolution through civil legal process.

Some legislative action will be necessary to correct these deficiencies and the question remains whether a designated act is required to facilitate these changes. As discussed earlier, it is felt that, unless certain necessary changes cannot be accomplished through the amendment of existing legislation, then the tendency toward industry specific legislation should be discouraged.

A number of the "gaps" identified would be difficult to incorporate into existing legislation, in particular the following:

1. the creation of designated aquaculture areas;

2. the creation of a aquaculture appeal board and dispute resolution mechanism;

3. exclusive rights to certain locations including the right to exclude certain adverse users of the resource; and

4. the creation of property rights to the stock.

As the number of "gaps" which exist that appear to require a separate statute it is concluded that the province of British Columbia should consider the need to prepare and enact a designated aquaculture act incorporating all aspects of tenure, licencing, development and control as well as conferring on aquaculturists and their lenders those rights necessary to foster continued investment in this industry. The act could also deal with the rights of other interested parties who desire input to specific decisions in order to avoid conflicts with use of the resource.

TABLE NOTES

In order to understand the table provided, it is necessary to explain some of abbreviations and the tables format.

1. Except for B.C. all the other countries, provinces, states, and territories were only examined under a single act and its regulations for provisions dealing with aquaculture. B.C. has many provisions under several acts and their regulations which deal with aquaculture. The compilation of all these acts and regulations are located in the column under B.C. It should be noted that, as a result of this compilation, their still may exist confusion as to which acts and regulations pertain to aquaculture. In making up this compilation, a very broad interpretation of the acts and regulations was used and as a result may not reflect the true eXtent of legislative provisions for aquaculture in B.C.

2. The blank spaces on the table indicate areas for which no legislative provisions exist.

3. The following abbreviations are used in the table and stand for:

y	- year
mth	- month
impl	- implied
dem	- on demand
ind	- indefinite
yes	- allowed in legislation
no	- not allowed in legislation
100m	- within 100 metres of the site
site	- within the boundaries of the site
14d	- within 14 days of the escape
reas	- enter at a reasonable time
any	- enter at any time
bus	- enter during business hours only

4. The duration times indicate the maximum possible limits for a lease or licence. It should be noted that in each case the designated authority can prescribe the duration for any period of time less than the maximum.

LEGISLATIVE PROVISIONS FOR	CANADA							AUSTRALIA					UNITED STATES								
	N.S.	N.F.	N.B.	H.K.	N.Z.	U.K.	NOR.	Q.L.	N.S.W.	S.A.	N.T.	Tas.	Al.	Cal.	Mai.	Mich.	N.H.	S.C.	Tex.	Wash.	B.C.
LAND TENURE OF SUB-AQ LD																					
- leasing sub-aq. lands	yes		yes						yes	yes	yes	yes	yes	yes	yes						yes
- right to occupy sub-aq lands (lic. or permit)			yes	yes				yes		yes		yes									yes
- duration of lease	10y		10y						indef.	10y	ind.	ind.	ind	25y	10y						60y
- duration of occ. right			3y					ind.		10y		ind.									*
- land tenure gives excl use of land & column	yes		yes	yes				no	no	yes	no	yes	yes	yes	yes						no
- mineral rights incl.	no		no																		no
- land tenure renewable	yes								yes	yes	yes	yes	yes	yes	yes						yes
- land tenure transfer.			no						yes	yes			no		yes						no
- land tenure amendable	yes											yes									yes
- land tenure revokable	yes		yes						yes	yes	yes	yes		yes							yes
- aquacit. area reserves	yes		yes	yes									yes	yes							no
GETTING STARTED																					
- aquaculture lic. req.	yes	yes	yes	yes	yes		yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes
- bus. to be registered						yes				yes				yes						yes	yes
- appl. form provided		yes	yes		yes	yes		yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes		yes
- applicant to provide:																					
- specific information	yes				yes			yes	yes	yes		yes	yes	yes	yes	yes	yes	yes	yes		
- general particulars						yes					yes										yes
- notice of bus. req.	yes			yes		yes			yes	yes	yes	yes		yes	yes		yes	yes			yes
- public hearing req.	yes												yes	yes	yes		yes	yes			no
- consult with other dep	yes											yes		yes		no				yes	no
- may refuse issuance	yes		yes	yes	yes		yes	yes					yes	yes		yes		yes	yes	yes	yes
THE DESIGNATED AUTHORITY																					
- may suspend the lic.		yes			yes		yes			yes						yes	yes	yes	yes	yes	yes
- may revoke the lic.	yes	yes		yes			yes	yes	yes	yes	yes	yes			yes	yes	yes	yes	yes	yes	yes
- may amend the lic.	yes	yes	yes							yes	yes	yes					yes	yes			yes
GROUNDS FOR REF/SUS/TER/ OR AMENDING THE LICENCE																					
- fail to comply with:																					
- terms & conds of lic	yes	yes	yes	yes	yes						yes	yes			yes		yes	yes	yes	yes	yes
- statutes or regs.	yes	yes	yes	yes	yes						yes	yes			yes	yes	yes	yes	yes	yes	yes
- no appreciable use	yes		yes	yes			yes								yes						
- not in pub. best int.				yes			yes										yes	yes			
- upon surrender of lic.			yes								yes	yes									
- Appeal Board																					
DURATION OF THE LICENCE	10y	ind	10y	1y	14y		ind	ind	ind		ind	1y	ind	1y	1y	ind	ind	2y	ind		1y
RIGHTS & OBLIG OF HOLDER																					
- licence renewable	yes		yes	yes	yes			yes			yes	yes	yes		yes				yes		yes
- lic. ass/transferable			no	no	yes				no		no	yes	yes		yes	no		yes			no
- lic. has terms & conds	yes	yes	yes	yes	yes		yes	yes	yes	yes	yes	yes	yes				yes	yes			yes
- exempt from fish. res.					yes	yes	yes							yes			yes			yes	
- must maintain records	yes	yes	yes		yes	yes		yes		yes	yes	yes		yes	yes	yes	yes	yes	yes	yes	yes

* Subject to terms imposed by the Minister

LEGISLATIVE PROVISIONS FOR	CANADA							AUSTRALIA					UNITED STATES							
	N.S.	N.F.	N.B.	H.K.	N.Z.	U.K.	NOR.	Q.L.	N.S.W.	S.A.	N.T.	Tas.	Al.	Cal.	Mai.	Mich.	N.H.	S.C.	Tex.	Wash	B.C.
- must submit rec. every	year	year	year			year		year		6mth	mth.	mth.		year	year	year	year	year	year		dem.
- lic. must be displayed		yes	yes		yes											yes	yes				
- must report disease or parasite outbreak		yes	yes		yes					yes			yes					yes			yes
- import & intro of for. species restricted	yes				yes	yes				yes			yes	yes		yes		yes	yes	yes	yes
- entitled to hearing or reasons for admin dec.			no	yes							yes	yes	yes		yes	yes				yes	yes
- labelling of prod req.											yes			yes			yes	yes		yes	yes
- marking of site areas	yes			yes					yes			yes			yes						
- ppty. interest in prod	yes	yes	yes	yes	yes		yes	yes	yes		yes	yes		yes			yes	yes		yes	
- escape still ppty in	100m	100m	site				14d	yes						site			site				impl
INSPECTION & ENFORCEMENT																					
- the authorities may:																					
- enter at...time	reas	reas	reas	any	reas		any		any		reas	reas	bus	any			any	bus.			any
- search premises	yes	yes	yes	yes	yes		yes		yes	yes	yes	yes	yes	yes				yes	yes		yes
- seize anything			yes	yes		yes	yes			yes	yes			yes			yes	yes			yes
- take test samples	yes	yes	yes		yes				yes	yes	yes	yes				yes				yes	yes
- quarantine premises	yes	yes	yes	yes	yes					yes		yes	yes	yes							
- order stock disposal	yes	yes	yes	yes	yes			yes		yes		yes	yes	yes				yes	yes	yes	yes
- order equip. disinf.		yes			yes					yes											
- inspect records	yes	yes	yes				yes		yes		yes	yes			yes	yes	yes	yes	yes		yes
- offences include:																					
- contravention of Act regs, terms or conds	yes	yes	yes	yes	yes	yes	yes		yes	yes	yes		yes			yes		yes			yes
- no licence for bus.	yes	yes	yes	yes				yes	yes		yes	yes									
- obstructing officer	yes	yes	yes	yes		yes			yes		yes	yes									yes
- giving false info	yes	yes	yes			yes					yes	yes									yes
- failing to submit the records	yes		yes			yes					yes	yes									yes
- interfering with the aquaculturist		yes	yes	yes				yes	yes		yes	yes		yes			yes	yes	yes		yes
- continuing off. considered separate off/day	yes	yes	yes	yes								yes									
- corporate liability for acts of employee			yes			yes	yes				yes							yes			
- any defences allowed			yes								yes										
- penalties are to be:																					
- fines	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes			yes		yes	yes		yes
- imprisonment		yes	yes	yes		yes						yes	yes			yes			yes		
- higher for repeats		yes																yes			yes
- forfeiture of stock				yes			yes				yes							yes			yes
OTHER PROVISIONS																					
- st. dev. plan/fin. ass						yes					yes			yes					yes	yes	
- dept. of fisheries or dept. of agriculture	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes			yes	yes			yes
			yes						yes					yes				yes	yes	yes	yes

LEGISLATIVE PROVISIONS FOR	CANADA							AUSTRALIA					UNITED STATES								
	N.S.	N.F.	N.B.	H.K.	N.Z.	U.K.	NOR.	Q.L.	N.S.W.	S.A.	N.T.	Tas.	Al.	Cal.	Mai.	Mich.	N.H.	S.C.	Tex.	Wash.	B.C.

SCHEDULE 1

GENERAL TERMS OF AN AQUACULTURE LICENCE

1. For the purpose of this licence

"aquatic plant" includes benthic and detached algae, marine flowering plants, brown algae, red algae, green algae and phytoplankton;

"Branch" means the Aquaculture and Commercial Fisheries Branch of the Ministry of Agriculture and Fisheries;

"Development Plan" means a plan filed with and approved by the Branch for the species and location specified on the face of this licence; and

"fish" means the whole or any part of an aquatic animal, and includes but is not limited to fin fish, molluscan shellfish and crustacean shellfish.

2. The holder of an Aquaculture Licence shall

2(1) comply with each Development Plan;

2(2) apply for and have approved amendments to a Development Plan before (a) exceeding by more than 20% the maximum production level identified in the Development Plan or (b) changing the mode of operation currently authorized;

2(3) culture or husband only those species authorized by this licence, and only if importation and transplantation authorizations have been obtained from all competent governmental authorities;

2(4) take reasonable precautions to prevent the escape of cultured aquatic plants or fish (a) if transporting them on, over or through fresh or tidal waters, and (b) from the holder's aquaculture facility and from containment and attachment structures in the facility;

2(5) ensure that neither the holder nor any person acting on behalf of the holder deliberately releases cultured aquatic plants or fish from the holder's aquaculture facility, unless authorized to do so by a Special Proviso attached to this licence;

2(6) ensure that the holder or a person acting on behalf of the holder who discovers an escape or evidence suggesting an escape of cultured aquatic plants or fish reports the escape or evidence and the results of any authorized recapture or recapture attempt to the Manager of Aquaculture;

2(7) ensure that the aquatic plants and fish cultivated and husbanded in the holder's aquaculture facility are given care and attention consistent with their biological requirements;

2(8) undertake at the holder's own expense, reasonable and lawful husbandry practices necessary for (a) preventative predator control and (b) disease control, including that required by competent governmental authorities;

2(9) keep records adequate to allow an Aquaculture Inspector, an Inspector of Fisheries or a Conservation Officer to determine if the holder is complying with the terms of this licence, the Aquaculture Regulation and the Fisheries Act (R.S.B.C.);

2(10) make available to an Aquaculture Inspector, an Inspector of Fisheries or a Conservation Officer, the records referred to in sub-paragraph 2(9) within one working day of a request being made or within any longer period specified by the inspecting officer;

2(11) advise the Manager of Aquaculture within a reasonable time of any change in the holder's (a) address, (b) telephone, radio telephone or facsimile machine number, and (c) representative (contact person) and that person's telephone, radio telephone or facsimile machine number;

2(12) deliver to the Branch, in the form and at the interval determined by the Minister, any information required to determine compliance by the holder with the terms of this licence, the Aquaculture Regulation and the Fisheries Act (R.S.B.C.);

2(13) possess a valid processing licence before processing aquatic plants or fish within the location specified on the face of this licence;

2(14) ensure that the aquaculture facility is operated in accordance with standards established by the Branch in consultation with industry; and

2(15) comply with all laws, bylaws and orders of any competent governmental authority which affect the aquaculture facility described herein

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